United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2039

To be argued by
JONATHAN J. SILBERMANN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
ex rel. CLEVELAND HINES,

Petitioner-Appellant,

-against-

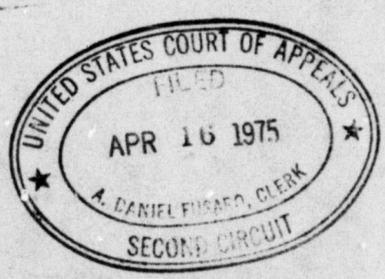
J. E. LaVALLEE, Superintendent,
Clinton Correctional Facility,
Dannemora, New York,

Respondent-Appellee.

Docket No. 75-2039

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Petitioner-
Appellant CLEVELAND HINES
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. CLEVELAND HINES, Petitioner-Appellant, -against- J. E. LaVALLEE, Superintendent, Clinton Correctional Facility, Dannemora, New York, Respondent-Appellee.	Docket No. 75-2039

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the statement made by appellant during questioning by the police after his arrest and without notification of his rights under Miranda v. Arizona should have been suppressed as violative of the Fifth Amendment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Robert J. Carter)* entered on December 26, 1974, denying without a hearing appellant's petition for a writ of habeas corpus.

On February 26, 1975, this Court granted a certificate of probable cause and leave to appeal in forma pauperis, and assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On July 13, 1972, at approximately 8:30 a.m., Patricia Gareri, on her way to work, parked her car in the parking lot of the Bronx Botanical Gardens (113**). As she left the automobile, a man holding a knife rushed to her from behind (114) and told her to get into the car. Mrs. Gareri refused, and

---

*The opinion of Judge Carter is annexed as "C" to appellant's separate appendix.

**Numerals in parentheses refer to pages of the state court pre-trial hearing and trial.

the man shoved her to the ground (114). She then entered the car and sat on the passenger's side (149-150) as the man got into the driver's seat (149). The man then forced her into the back seat with him and took her money and watch. During the incident, the man told Mrs. Gareri that he had been married for eleven years and had two children (119-120). The man proceeded to assault Mrs. Gareri (120-121) and then left the car (123-124).

When she subsequently spoke with the police, Mrs. Gareri advised them that the man who attacked her had stated he had been married for eleven years and had two children (164-165).

At approximately 1:00 p.m. on July 18, 1972, Police Officer Thomas Mitchell arrested appellant as he sat in the Bronx Botanical Gardens (186) reading a newspaper (203). Appellant was arrested because he resembled the man who had attacked Mrs. Gareri (206). Appellant was frisked, handcuffed (203), and taken in a police car to the station house. During the drive Officer Mitchell, who had not yet spoken to Mrs. Gareri (226), interrogated appellant (52-53) without informing him of his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436 (1966) (66).

During the course of the interrogation, and in response to specific inquiries, appellant told Mitchell that he had been married eleven years and had two children (53, 64, 190). On July 18, without having seen appellant, Mrs. Gareri signed a felony complaint charging appellant with robbery, rape, as-

sault, and possession of a weapon (24).

On August 7, 1972, an indictment was filed in Bronx County, accusing appellant of rape, sexual abuse, robbery, lesser included crimes, and possession of a weapon as a misdemeanor.

Approximately three months later a pre-trial hearing was held to determine whether statements made by appellant to Mitchell in the police car on July 18 after appellant's arrest should be suppressed as violative of appellant's Fifth Amendment rights since appellant had not received the warnings required by Miranda v. Arizona, supra, 384 U.S. 436.* The trial court denied the motion to suppress the statements at issue, holding that they were "pedigree" and outside the "perimeter" of Miranda (77-78).

At trial, Mrs. Gareri identified appellant as her assailant (115), and stated that the man who attacked her told her he had been married for eleven years and had two children (120-120A). Lieutenant Mitchell then testified that in response to questioning appellant told him, inter alia, that he had been married for eleven years and had two children (189-190).**

On November 22, 1972, after seven hours of deliberation, the jury returned a verdict finding appellant guilty of sexual

---

*This hearing also dealt with the propriety of the pre-trial photographic identification procedure and whether any in-court identification of appellant by Mrs. Gareri should be suppressed.

**This portion of Mitchell's testimony is annexed as "B" to appellant's separate appendix.

abuse and robbery as well as other crimes. On December 18, 1972, appellant was sentenced to separate concurrent terms of imprisonment to cover each of the crimes for which appellant was convicted. The longest term (8 1/3 to 25 years) was for robbery.

Appellant's conviction was affirmed by the Appellate Division, First Department, on December 6, 1973.* Leave to appeal to the Court of Appeals was denied on January 16, 1974.

Appellant's Application Pursuant to 28 U.S.C. §2241

By affidavit dated April 22, 1974, appellant applied, pursuant to 28 U.S.C. §2241, for a writ of habeas corpus and for vacature of the judgment of conviction. Appellant argued that statements made prior to Miranda warnings were improperly introduced at trial, in violation of Miranda v. Arizona, supra, 384 U.S. 436.**

---

*People v. Hines, 43 A.D.2d 679, 380 N.Y.S.2d 145 (1st Dept. 1973). Appellant's counsel asserted the Fifth Amendment Miranda issue raised in this appeal in his brief to the state court. See appellant's brief filed in People v. Hines in the Appellate Division, First Department. Appellant has exhausted his state remedies.

**Appellant also argued that the pre-trial photographic identification procedure was so suggestive as to taint Mrs. Gareri's in-court identification and that appellant was entitled to be represented at the pre-trial photographic spread at which he was identified. These issues are not raised on this appeal.

By opinion dated December 26, 1974, the District Court rejected appellant's claim, holding that appellant's statement was "pedigree" whose subject matter was not within his exclusive knowledge.

ARGUMENT

THE STATEMENT MADE BY APPELLANT DURING QUESTIONING BY THE POLICE AFTER HIS ARREST WITHOUT NOTIFICATION OF HIS RIGHTS UNDER MIRANDA v. ARIZONA SHOULD HAVE BEEN SUPPRESSED AS VIOLATIVE OF THE FIFTH AMENDMENT, AND ITS INTRODUCTION AT TRIAL REQUIRES REVERSAL.

The prophylactic warnings and rules required by Miranda v. Arizona, 384 U.S. 436 (1966), to protect an individual's Fifth Amendment rights clearly apply to all in custody statements made by an individual subjected to police interrogation:

> The warnings required and the waiver necessary ... are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.
>
> Id., 384 U.S. at 476.

The Supreme Court's intention to eliminate even subtle psychological pressures that might cause an accused to speak includes those pressures arising from even "informal," "conversational," or "friendly" custodial police questioning. Miranda

v. Arizona, supra, 384 U.S. at 452.*

The Courts of Appeal, however, are divided on the issue of whether Miranda is applicable to statements of family background and personal history, generally denominated "pedigree" information. In Proctor v. United States, 404 F.2d 819, 820-821 (1968), the District of Columbia Circuit held that all pedigree and other information, however innocuous or insignificant, gained as a result of custodial interrogation cannot be used against an accused at trial unless there is a waiver of Miranda rights.** Thus, information about Proctor's employment given in response to police questioning while filling out a line-up sheet form could not be used against him at trial. Moreover, the intent with which questions were asked by police was found to be irrelevant to the determination of whether the statement was admissible:

---

*The Court specifically disapproved of feigned friendship by an interrogator to gain a subject's cooperation. Miranda v. Arizona, supra, 384 U.S. at 452.

**Although Proctor specifically dealt with the use of statements obtained in violation of Miranda for impeachment purposes, an issue now apparently foreclosed by Oregon v. Hass, 43 U.S.L.W. 4417 (March 19, 1975), and Harris v. New York, 401 U.S. 222 (1971), Proctor remains viable for the proposition that a defendant's statements about pedigree and background information are subject to Miranda's requirements when used for the Government's case in chief, the situation in this case.

> Even innocent questions asked of a suspect in the inherently coercive atmosphere of the police station may create in him the impression that he must answer them.
>
> Proctor v. United States, supra, 404 F.2d at 821.*

On the other hand, cases which have allowed pedigree and background information into evidence absent Miranda warnings and a valid waiver have ignored the clear requirements of that case and are premised on invalid justifications. First, they state the general assertion that Miranda should not be applied strictly (Farley v. United States, 381 F.2d 357 (5th Cir. 1967); People v. Rivera, 26 N.Y.2d 304, 309 (1970)). Then they seek support on the ground either that the information elicited was not within the defendant's exclusive knowledge and could have been obtained through other means (see Farley v. United States, supra, 381 F.2d at 359; United States ex rel. Hines v. LaVallee, 74 Civ. 1891 (S.D.N.Y. 1974), "C" to appellant's separate appendix), or that statements resulting from custodial interrogation will be shielded from Miranda rules if there exists a reason for police questioning other than uncovering incriminating admissions, e.g., internal police record keeping. United

---

*Additionally, Proctor rejected the notion that, because the "booking process" has a purpose independent of uncovering incriminating statements and serves internal police record keeping policies, information elicited during the booking process is outside the scope of Miranda. See, e.g., State v. Smith, 203 N.W.2d 348, 351 (Minnesota 1972). What is more, in this case appellant's statements were not gained as a result of the booking process, nor has the State asserted that Mitchell's questions served a police function other than investigation.

States v. Menichino, 497 F.2d 935, 941 (5th Cir. 1974); State v. Smith, 203 N.W.2d 348, 351 (Minnesota 1972).

The first ground is directly rejected by the words of the Fifth Amendment, as well as by Miranda. The Fifth Amendment requires that "No person ... shall be compelled in any criminal case to be a witness against himself." Thus, absent a valid waiver,* the Fifth Amendment requires the Government to prove its case beyond a reasonable doubt from evidence other than that elicited from an accused. Indeed, the Government's need to circumvent the requirements of the Fifth Amendment is minimal where, as in this case, the desired information is not solely within the defendant's own knowledge and can easily be proved through independent means.

Similarly, the second ground was explicitly rejected by Miranda. See also Proctor v. United States, supra, 404 F.2d 819. Unless warnings and waiver are demonstrated, "no evidence obtained as a result of interrogation can be used against [a defendant.]" Miranda v. Arizona, supra, 384 U.S. at 479. "No evidence" includes all statements -- admissions and inculpatory statements as well as exculpatory remarks. Miranda v. Arizona, supra, 384 U.S. at 476-477.

---

*Miranda v. Arizona, supra, 384 U.S. 436.

The introduction of appellant's statements are not harmless error. See Chapman v. California, 386 U.S. 18 (1967); Harrington v. California, 395 U.S. 250 (1969). The statements were corroborative of the defendant's identity and directly substantiated the prosecution's case. On summation, the Assistant District Attorney remarked that the statements elicited by Officer Mitchell from appellant were crucial (450-453). In fact, the Assistant District Attorney asserted that in order to acquit appellant the jury would have to believe that Mitchell was lying and disbelieve his testimony about appellant's statements (451-452). Thus, even the State felt that appellant's statements and Mitchell's testimony about them were essential elements of the State's case.

Appellant's statements, introduced at trial, were elicited prior to his having received Miranda warnings and as a result of custodial police interrogation. This violated Miranda v. Arizona, supra, 384 U.S. at 476, and requires reversal of appellant's conviction.

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed and the writ of habeas corpus should issue, releasing appellant from custody unless the State re-tries him within sixty days.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Petitioner-
Appellant CLEVELAND HINES
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel

CERTIFICATE OF SERVICE

June 16, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Jonathan J. Silbermann